73-1320 FILE COPY

Supreme Court, U. S.
FILED
FEB 27 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1320

STERLING CURTIS BOWMAN,
Petitioner,

versus

THE STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

J. Russell Hornsby of
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311 North Rosalind Avenue
Orlando, Florida 32801
Counsel for Petitioner

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	3
Statutes, Federal Rules, and Regulations Involved	4
Statement	4
Reasons for Granting the Writ	8
Conclusion	13
Certificate	14
Order Staying Mandate	1a
Order Denying Rehearing	2a
Opinion of the Supreme Court of the State of Florida	3a

CITATIONS

Cases:

Bowman v. State of Florida, 281 S2d 35, 1973 1

Hilliard v. Beto, 465 F2d 829, 1972 9

James v. Smith, 455 F2d 502, 1972 10

Santobello v. New York, 404 US 257, 1971 .. 8, 10, 12

Miscellaneous:

Fifth Amendment to the Constitution of the United States of America 3, 4

Fourteenth Amendment to the Constitution of the United States of America 4

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No.

STERLING CURTIS BOWMAN,
Petitioner,

versus

THE STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

The Petitioner, Sterling Curtis Bowman, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Florida entered in the above case on October 23, 1973.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Florida has yet to be reported in the official reporters, but is appended to this petition in the Appendix at page 3a. The opinion of the First District Court of Appeal a Per Curiam affirmance is reported at 281 S2d 35.

JURISDICTION

The judgment of the Supreme Court of the State of Florida was made and entered on the 23rd day of October, 1973. The order denying a rehearing in the Supreme Court of the State of Florida was made and entered on the 13th day of December, 1973. The Order of the Supreme Court of the State of Florida granting a Stay of Mandate until January 18, 1974, was entered on December 14, 1973. Copies of these orders are appended to this petition in the Appendix, pages 1a through 3a. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

The Petitioner, Sterling Curtis Bowman, was sentenced to two years imprisonment by the Volusia County Felony Court of Record, Volusia County, Florida. The Petitioner, Sterling Curtis Bowman, entered a plea of nolo contendere to a charge of manslaughter as a result of a plea bargaining arrangement wherein the State Attorney's Office in Volusia County, Florida, agreed to nolle prosequi three other charges then pending against the Petitioner, Sterling Curtis Bowman, for Petitioner's plea of nolo contendere. The said plea was accepted by the Felony Court of Record in Volusia County, Florida.

Immediately after the sentence was pronounced the Petitioner, Sterling Curtis Bowman, requested an evidentiary hearing on the basis that he had been misled into making his plea of nolo contendere and had been

led to believe, and did believe, that he would receive no jail time as a result of entering his plea and in fact would receive probation.

The request for an evidentiary hearing was denied by the Felony Court of Record in Volusia County, Florida, and the court refused to hear any further evidence in the matter or any argument of counsel. This decision by the Felony Court of Record, Volusia County, Florida, was appealed to the First District Court of Appeal of the State of Florida where a Per Curiam affirmance was entered by the said Appellate Court on the 28th day of June, 1973.

The Petitioner, Sterling Curtis Bowman, petitioned the Supreme Court of the State of Florida for Writ of Certiorari to issue in his case. The Supreme Court of the State of Florida denied the Writ of Certiorari with one Justice, Justice Ervin of the Supreme Court of the State of Florida, dissenting, stating that the petition should require a return from the State of Florida to show that the substituted plea was voluntary and if doubt exists an evidentiary hearing should be held.

The question presented to this Court is:

1. Whether the Petitioner, Sterling Curtis Bowman, was denied Due Process of law as guaranteed by the Fifth Amendment to the United States Constitution, when his request for an evidentiary hearing was denied to determine the voluntariness of his substituted plea of nolo contendere in light of his affidavit that he filed with the court stating that he had been misled into

making his substituted plea and that he had been misled into believing that he would receive probation as a result of making his plea.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution.

2. The Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On May 15, 1972, the Petitioner, Sterling Curtis Bowman, was informed against for the crime of manslaughter by driving a vehicle while intoxicated in Volusia County, Florida. Thereafter, on May 26, 1972, the Petitioner appeared before the Felony Court of Record of Volusia County, Florida, and entered a plea of not guilty to both counts of the information.

On September 8, 1972, the Petitioner, Sterling Curtis Bowman, appeared before the Felony Court of Record of Volusia County, Florida, and entered a substituted plea of nolo contendere to one count of manslaughter by driving a vehicle while intoxicated. Subsequently, on October 20, 1972, the Felony Court of Record of Volusia County, Florida, adjudged the Petitioner to be guilty of the offense and committed to imprisonment by confinement to the custody of the Division of Corrections for the State of Florida for a total of two years.

On November 7, 1972, a motion to set aside plea of nolo contendere and enter a plea of not guilty was filed. At said time an affidavit by the defendant, Sterling Curtis Bowman, was filed in support of the motion.

On the 7th day of November, 1972, the judge of the Felony Court of Record of Volusia County, Florida, denied the Petitioner's motion to set aside plea of nolo contendere and enter a plea of not guilty, and denied an evidentiary hearing on the matter.

Thereafter, the Petitioner, Sterling Curtis Bowman, appealed said decision to the First District Court of Appeal, which is the next step in the appellate court system in the State of Florida, to review the decision of the judge of the Felony Court of Record of Volusia County, Florida. The First District Court of Appeal by Order dated the 28th day of June, 1973, Per Curiam affirmed the decision of the Felony Court of Record of Volusia County, Florida.

Petitioner, Sterling Curtis Bowman, immediately filed a petition for Writ of Certiorari in the Supreme Court of the State of Florida, asking the Supreme Court to review the decision of the First District Court of Appeal. Said petition immediately stayed the issuance of the Mandate by the First District Court of Appeal until such time as the Supreme Court of the State of Florida took further action. In a decision dated October 23, 1973, the Supreme Court of the State of Florida denied the Writ of Certiorari, with Justice Ervin of the Supreme Court of the State of Florida dissenting.

The Supreme Court of the State of Florida by order dated December 13, 1973, denied the Petitioner's motion for rehearing for denial of Writ of Certiorari. On December 14, 1973, the Supreme Court of the State of Florida, stayed the issuance of its Mandate up to and including January 18, 1974, to enable the Petitioner to seek review in the Supreme Court of the United States of America and obtain any further stay from that Court.

Petitioner, Sterling Curtis Bowman, raised the federal question that the Felony Court of Record for Volusia County, Florida, had denied the Petitioner's constitutional rights by denying him an evidentiary hearing to determine the voluntariness of his plea when he filed his motion to set aside a plea of nolo contendere and enter of plea of not guilty. The Volusia County Felony Court of Record for Volusia County, Florida, decided that an evidentiary hearing was not necessary and refused to hear any evidence and refused to hear any oral argument of counsel or ask the State to make a return to determine if the plea was in fact voluntarily entered.

The question of the denial of the Petitioner's constitutional right of Due Process was raised in the First District Court of Appeal, State of Florida, wherein the Petitioner requested the First District Court of Appeal to review the Felony Court of Record for Volusia County, Florida, to require the Felony Court of Record to have an evidentiary hearing to determine if the plea was voluntary. The First District Court of Appeal refused the Petitioner by their Per Curiam affirmance.

The Supreme Court of the State of Florida had before it the same issues on whether the Petitioner's constitutional rights had been violated by failure to grant an evidentiary hearing to determine if the plea was voluntarily entered and in fact the dissenting Justice, Justice Ervin, stated as follows:

> "I believe we should treat the petition for writ of certiorari as one sounding in habeas corpus and require a return from the state. Where a plea of nolo contendre is substituted for a plea of not guilty the record should show if it was voluntary. See Boykin vs. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709. If the State's return clearly shows the substituted plea was voluntary then the writ should be discharged. But if doubt exists an evidentiary hearing should be held."

The issue of whether the Felony Court of Record of Volusia County, Florida, has violated the Petitioner's constitutional rights of Due Process of law by denying the Petitioner an evidentiary hearing in light of his affidavit that he had been misled into entering his substituted plea of nolo contendere, in effect has been decided by the First District Court of Appeal and the Supreme Court of the State of Florida although no written opinions on the specific issue have been written by the affirmance of the decision of the Felony Court of Record, they have effectively decided the issue that the Petitioner's constitutional rights have not been violated, all of which is contrary to the decisions of this Court.

REASONS FOR GRANTING THE WRIT

The decisions rendered below by the Supreme Court of the State of Florida, The First District Court of Appeal of the State of Florida and the Felony Court of Record of Volusia County, Florida, have decided an important question of federal law which should be settled by this Court. The Supreme Court of the State of Florida in holding that the Petitioner's constitutional rights have not been violated by the Felony Court of Record's refusal to have an evidentiary hearing on whether the plaintiff's substituted plea of nolo contendere accepted by the Court was voluntary is contra to this Court's decision of *Santobello v. New York, 404 U.S. 257, 1971.* This Court should grant the Writ of Certiorari to decide the constitutional question which was raised by Petitioner, Sterling Curtis Bowman, of whether the Petitioner, Sterling Curtis Bowman, was denied Due Process of law as guaranteed by the Fifth Amendment to the United States Constitution, when his request for an evidentiary hearing was denied to determine the voluntariness of his substituted plea of nolo contendere in light of his affidavit that he filed with the court stating that he had been misled into making his substituted plea and that he had been misled into believing that he would receive probation as a result of making his plea.

Prior to this Court's decision in *Santobello v. New York,* a criminal defendant when testifying before the sentencing trial judge stating that no deal had been made could not then thereafter attack said sentence on the grounds that the plea had been involuntarily

made or that a deal had not been kept. However, this Court's decision in *Santobello v. New York* has radically changed the law of this particular point. In the case of *Hilliard v. Beto, 465 F2d 829, 1972,* the Fifth Circuit Court of Appeals was presented with an analogous fact situation wherein a state prisoner at his sentencing denied any promises or inducements prior to entering his guilty plea. However, the Fifth Circuit Court of Appeals ruled in this case that this did not totally foreclose further inquiry on the petition for federal habeas corpus as to whether his plea of guilty was induced by an unkept promise of the District Attorney that the prisoner would receive five years instead of a life sentence as entered by the sentencing judge. The Fifth Circuit Court of Appeals went on to state that the case would be remanded for development of facts relating to alleged plea bargaining. In the *Hilliard* case the Fifth Circuit Court of Appeals stated that it is not unlikely that the prisoner tailored his record responses to the State's trial court inquiries to assure their acceptance even to the extent of being less than truthful on record with the trial court if that were necessary to consummate the plea agreement. In our case sub judice, the Petitioner, Sterling Curtis Bowman, was misled into believing that he would receive probation and no jail time for changing his plea of not guilty and substituting a plea of nolo contendere to one count of manslaughter. There was presently pending against the Petitioner, Sterling Curtis Bowman, three additional charges of manslaughter which were nolle prosequied by the State, tending to indicate that there was plea bargaining discussed between the State and the Petitioner, Sterling Curtis Bowman, and that the

Petitioner, Sterling Curtis Bowman, living up to his bargain by changing his plea, the state having nolle prosequied three charges living up to part of its bargain, but not as fully as the Petitioner had been led to believe.

This Court in the *Santobello* case recognized the essential role in the administration of justice played by the plea bargaining process and the consequent responsibility of the courts to vouchsafe the institution by insisting upon absolute fairness in its operation. The Petitioner, Sterling Curtis Bowman, gave the record answer that he had not been promised and that he was freely and voluntarily entering his plea, when in fact he had been misled into believing that he would receive probation and that there would be no jail time involved.

In the case of *James v. Smith, 455 F2d 503, 1972,* the Petitioner, William H. James, was denied an evidentiary hearing on petition for habeas corpus by the United States District Court for the Northern District of Georgia. In this case the Fifth Circuit Court of Appeals held that the claim of relief by habeas corpus petition based on asserted failure of State to live up to a plea bargain would be remanded for whatever further evidentiary proceedings would be warranted. In this case the United States Court of Appeals for the Fifth Circuit adopted the rationality of this Court in *Santobello* and remanded the case for evidentiary hearing.

Justice Ervin of the Supreme Court of the State of Florida in the decision involving the case of the Petitioner, Sterling Curtis Bowman, stated that:

> "I believe we should treat the petition for writ of certiorari as one sounding in habeas corpus and require a return from the state. Where a plea of nolo contendere is substituted for a plea of not guilty the record should show if it was voluntary. See Boykin vs. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709. If the State's return clearly shows the substituted plea was voluntary then the writ should be discharged. But if doubt exists an evidentiary hearing should be held."

The dissenting Justice recognized that there is a denial of Due Process when the trial court refuses to grant an evidentiary hearing to determine if the plea was voluntarily made. The Felony Court of Record for Volusia County, Florida, cannot foreclose further inquiries forever from Petitioner, Sterling Curtis Bowman.

From the cases decided on this issue the federal courts on petitions for habeas corpus have taken the correct view that the case should be remanded to the state courts for an evidentiary hearing. Petitioner, Sterling Curtis Bowman, has the benefit of not being presently incarcerated at the time this petition is written and should be afforded the same rights that a prisoner in custody would have in order to determine if an evidentiary hearing should be required. This Court

should grant its Writ of Certiorari to review this case and decide the constitutional question of whether Petitioner, Sterling Curtis Bowman's constitutional right of Due Process has been violated by the failure of the trial court judge to grant an evidentiary hearing to determine if the plea was voluntarily entered. In fact, the trial court judge required no other further evidence other than the record responses which this Court has in the *Santobello* case denounced as not totally foreclosing any additional inquiry into the matter. It appears that the courts of the State of Florida through their affirmance of the trial court's decision are in direct conflict with the decision of this Court and have decided the constitutional issue of the denial of Due Process. In citing from the opinion of Justice Douglas in the *Santobello* case: "Plea bargaining may be established that a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the formal rights of a jury trial, to confront ones accusers, to present witnesses in ones defense, to remain silent, and to be convicted with proof beyond all reasonable doubt." It appears that this Court should decide the questions of whether the plea bargaining process should be accepted by the trial court on its face by the record answers. The rights of the Petitioner, Sterling Curtis Bowman, are at stake when he substitutes his plea of not guilty to a plea of nolo contendere which was accepted by the Court. Said action by the Petitioner, Sterling Curtis Bowman, waiving his constitutional rights should be closely scrutinized by the courts of this county as to a defendant's rights guaranteed by the Constitution. The Petitioner, Sterling Curtis Bowman, should have been given an

opportunity to explain to the court the facts surrounding entry of his substituted plea, and to show the court that he had been misled into thinking by the State Attorney's office that he would receive probation for said plea.

CONCLUSION

For the reasons set forth above it is respectfully submitted that Petition for Writ of Certiorari should be granted.

J. RUSSELL HORNSBY of
Law Offices of
J. Russell Hornsby
311 North Rosalind Avenue
Orlando, Florida 32801
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Florida has been furnished by mail to the Clerk of the Supreme Court of the State of Florida, the Clerk of the First District Court of Appeal of the State of Florida, the Clerk of the Felony Court of Record of Volusia County, Florida, and to the Honorable Enoch J. Whitney, Assistant Attorney General of the State of Florida, this ____ day of February, 1974.

J. RUSSELL HORNSBY of
Law Offices of
J. Russell Hornsby
311 North Rosalind Avenue
Orlando, Florida 32801
Counsel for Petitioner

APPENDIX

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1973
FRIDAY, DECEMBER 14, 1973

STERLING CURTIS BOWMAN,
Petitioner,

versus Case No. 44,271

STATE OF FLORIDA,
Respondent.

Petitioner has filed petition for stay of mandate, and upon consideration thereof, said petition is granted and proceedings in this Court are stayed and further proceedings in the First District Court of Appeal and in the Felony Court of Record in and for Volusia County, Florida are hereby stayed to and including January 18, 1974 to enable petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that court, and it is further

ORDERED that this stay be subject to continuance in effect of the present appeal bond in the same amount and on the same conditions.

A True Copy
TEST:
SEAL
Sid J. White
Clerk Supreme Court.
By: /s/ KAY D. YENT, Deputy Clerk.

CC: Law Offices of J. Russell Hornsby
(Hon. James M. Campbell)
Hon. Enoch J. Whitney
Hon. Raymond E. Rhodes, Clerk
Hon. Uriel Blount, Jr., Judge
Clerk, Felony Court of Record

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1973
THURSDAY, DECEMBER 13, 1973

STERLING CURTIS BOWMAN,
Petitioner,

versus Case No. 44,271

STATE OF FLORIDA,
Respondent.

On consideration of the petition for rehearing filed by attorneys for petitioner,

IT IS ORDERED by the Court that said petition is visited to the revised order of October 23, 1973 and denied.

CARLTON, C.J., ROBERTS, McCAIN and
DEKLE, JJ., CONCUR
ERVIN, J., dissents

A True Copy
TEST:

SEAL
Sid J. White
Clerk Supreme Court.
By: /s/ KAY D. YENT, Deputy Clerk.
CC: Law Offices of J. Russell Hornsby
(Hon. James M. Campbell)
Hon. Enoch J. Whitney
Hon. Raymond E. Rhodes, Clerk
Clerk, Felony Court of Record
Hon. Uriel Blount, Jr., Judge

REVISED ORDER

SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1973
TUESDAY, OCTOBER 23, 1973

STERLING CURTIS BOWMAN,
Petitioner,

ve-sus Case No. 44,271

STATE OF FLORIDA,
Respondent.

DISTRICT COURT OF APPEAL,
FIRST DISTRICT
S-171

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional

briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, C.J., ROBERTS, McCAIN and
DEKLE, JJ., concur
ERVIN J., dissents.

ERVIN, J., dissenting:

I believe we should treat the petition for writ of certiorari as one sounding in habeas corpus and require a return from the state. Where a plea of nolo contendere is substituted for a plea of not guilty the record should show if it was voluntary. See Boykin vs. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709. If the State's return clearly shows the substituted plea was voluntary then the writ should be discharged. But if doubt exists an evidentiary hearing should be held.

A True Copy
TEST:
SEAL
Sid J. White
Clerk Supreme Court
By: /s/ KAY D. YENT,
Deputy Clerk
CC: Hon. Raymond E. Rhodes, Clerk
Clerk, Felony Court of Record
Hon. Uriel Blount, Jr., Judge
Hon. J. Russell Hornsby
Hon. James Campbell
Hon. Enoch J. Whitney

I

Sterling Curtis BOWMAN, Appellant,

v.

STATE of Florida, Appellee.

No. S-171.

District Court of Appeal of Florida,
First District.

June 28, 1973.

Rehearing Denied Aug. 20, 1973.

Appeal from Felony Court of Record, Volusia County; Uriel Blount, Jr., Judge.

J. Russell Hornsby, Orlando, for appellant.

Robert L. Shevin, Atty. Gen., and Enoch J. Whitney, Asst. Atty. Gen., for appellee.

PER CURIAM.

The briefs and the record on appeal having been read and given full consideration, and the appellant having failed to demonstrate reversible error, the judgment of the lower court is affirmed.

SPECTOR, C. J., JOHNSON, J., and MELVIN, Associate Judge, concur.

Felony Court of Record Minute Book 12, Page 228
Form No. 1.

IN THE FELONY COURT OF RECORD
IN AND FOR VOLUSIA COUNTY,
Florida.

September Term, 1972.
Case No. 2367

THE STATE OF FLORIDA
vs.
STERLING CURTIS BOWMAN,
Defendant

JUDGMENT AND SENTENCE

You, Sterling Curtis Bowman, having been duly arraigned under and having entered your plea of NOLO CONTENDERE to Count I of an INFORMATION charging you with the crime of manslaughter by driving a vehicle while intoxicated the Court now adjudges you to be GUILTY of that offense. What have you to say why the sentence of the law should not be pronounced upon you? Saying nothing: It is the sentence of the law and such is the judgment of the Court that you, Sterling Curtis Bowman, be imprisoned by confinement and committed to the custody of the Division of Corrections for a term of Two (2) years, and the Sheriff of Volusia County, Florida, is hereby ordered and directed to deliver you to the Division of Corrections of the State of Florida, with a copy of this sentence, forthwith.

DONE AND ORDERED in Open Court at DeLand, Volusia County, Florida, this 20th day of October A.D. 1972.

/s/ URIEL BLOUNT, JR.
Uriel Blount, Jr., Judge
Felony Court of Record,
Volusia County, Florida

Filed in Open Court and Recorded in Felony Court of Record Minute Book No. 12 page 228 This 20 day of October, 1972.

Jess Mathas
Clerk Felony Court of Record,
Volusia County, Florida

/s/ ERNEST LITTLE
Deputy Clerk.

STATE OF FLORIDA

UNIFORM COMMITMENT TO CUSTODY
OF DIVISION OF CORRECTIONS

FELONY COURT OF RECORD

VOLUSIA County SEPTEMBER Term, 1972

Conviction for Manslaughter by driving a vehicle while intoxicated

Date of conviction September 11, 1972

Date of sentence imposed October 20, 1972

Term of sentence Two (2) years, Custody Division of Corrections

STATE OF FLORIDA,
Plaintiff,

vs.

STERLING CURTIS BOWMAN,
Defendant.

"Case No. 2367"

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of IN-

FORMATION judged and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable Uriel Blount, Jr. Judge of said Count, as also Jess Mathas Clerk, and the Seal thereof, this the 20th day of October, 1972

/s/ JESS MATHAS
Clerk of said Court

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

IN THE FELONY COURT OF RECORD
OF VOLUSIA COUNTY, FLORIDA
CASE NO. 2367

THE STATE OF FLORIDA
vs.
STERLING CURTIS BROWN,
Defendant.

ORDER

The "Motion To Set Aside Plea of Nolle Contendere and Enter a Plea of Not Guilty" and the "Affidavit in Support of Motion For Discretionary Reduction of Sentence", together with the various attachments thereto, said affidavit being not supported by motion filed herein, this day coming to the attention of the Court, and the Court finds that there has been no showing of abuse of its discretion, and that these matters and things were before the Court at the time of passage of sentence, and that the allegations contained in the Motion To Set Aside Plea are mere assertions of the defendant, unsubstantiated by the record at the time that the defendant entered his plea, as the Court discharged by judicial inquiry every conceivable effort to give the defendant his "day in court" prior to accepting the plea of Nolo Contendere; the Court further finds that said defendant entered his plea knowingly, freely and voluntarily, and that it is not necessary or proper that an evidentiary hear-

ing be held, and the Court being fully advised in the premises, it is, therefore,

ORDERED and ADJUDGED that the defendant's "Motion To Set Aside Plea of Nolle Contendere and Enter a Plea of Not Guilty" and the "Affidavit in Support of Motion For Discretionary Reduction of Sentence" filed herein, but not supported by a motion, as submitted by the above-named defendant, be, and the same are hereby, denied.

DONE and ORDERED in Chambers at DeLand, Volusia County, Florida, this 7th day of November, A.D. 1972.

/s/ URIEL BLOUNT, JR.
URIEL BLOUNT, JR., JUDGE
FELONY COURT OF RECORD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Order have been furnished, by mail, this 7th day of November, 1972, to: STEPHEN L. BOYLES, State Attorney, P. O. Box 2243, Daytona Beach, Florida 32015; and to J. RUSSELL HORNSBY, Attorney for Defendant, 311 North Rosalind Avenue, Orlando, Florida.

/s/ JESSIE B. BLOUNT
COURT SECRETARY

FILE COPY

Supreme Court, U. S.
FILED
MAY 17 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1320

STERLING CURTIS BOWMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

ROBERT L. SHEVIN
Attorney General

ENOCH J. WHITNEY
Assistant
Attorney General

The Capitol
Tallahassee, Florida
32304

COUNSEL FOR RESPONDENT

TOPICAL INDEX

	PAGES
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	3
ARGUMENT	3-5
CONCLUSION	6
PROOF OF SERVICE	7
APPENDIX	8

TABLE OF CITATIONS

CASES

	PAGES
Bowman v. State, 286 So. 2d 9 (Fla. 1973)	1
Callendar et al v. Florida, 380 U. S. 519, 14 L.Ed.2d 265, 85 St.Ct. 1325 (1965), 383 U.S. 270, 15 L.Ed.2d 749, 86 S.Ct. 924 (1966)	4
Callendar et al v. State, 181 So. 2d 529 (Fla. 1966)	3
Dresner et al v. Tallahassee, 375 U. S. 136, 11 L.Ed.2d 208, 84 S.Ct. 235 (1963), 378 U.S. 539, 12 L.Ed.2d 1018, 84 S.Ct. 1895 (1964)	4
John v. Paullin, 231 U.S. 583 (1913)	5
Wolfe v. North Carolina , 364 U.S. 177, 4 L.Ed.2d 1650, 80 S.Ct. 1482 (1960)	5

OTHER AUTHORITIES

28 U.S.C.A. Section 1257(3)	3,5

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1320

STERLING CURTIS BOWMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT

OPINION BELOW

On October 23, 1973, the Supreme Court of Florida filed its opinion in Bowman v. State, Case No. 44,271. Petitioner Bowman filed a Petition for Rehearing which was denied on December 13, 1973; and, thus, the opinion previously filed on October 23, 1973, became final. The opinion sought to be reviewed herein is reported at 286 So. 2d 9 and is printed in Respondent's Appendix A.

JURISDICTION

Petitioner is attempting to invoke the jurisdiction of this Court pursuant to 28 U.S.CA § 1257, which, as applicable herein, provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

QUESTION PRESENTED

WHETHER THE JURISDICTION OF THIS COURT HAS BEEN PROPERLY INVOKED PURSUANT TO 28 U.S.C.A. SECTION 1257(3)?

ARGUMENT

Petitioner has attempted to invoke the jurisdiction of this Honorable Court pursuant to 28 U.S.C.A. Section 1257(3), supra. Respondent respectfully submits that the order of the Florida Supreme Court denying the petition for writ of certiorari (Respondent's Appendix A) is not such "final judgment or decree" rendered by the highest court of a state in which a decision could be had within the meaning of 28 U.S.C.A. Section 1257, supra. The only judgment or decision which the Florida Supreme Court rendered in this cause was the decision that the Florida Supreme Court lacked jurisdiction to determine the merits of the appeal. In determining that they had no jurisdiction, the Florida Supreme Court did not reach any federal question which might have been involved in the cause nor did it deny petitioner any federal right properly presented for review. Its decision was simply based on the valid non-federal ground that it lacked jurisdiction in the cause. Callendar et al. v. State, 181 So. 2d 529 (Fla. 1966).

It has been the uniform position of this Court to rely on the authority of the Florida Supreme Court to determine its jurisdiction and the jurisdiction of every other Florida court. Dresner et al v. Tallahassee, 375 U.S. 136, 11 L.Ed.2d 208, 84 S.Ct. 235 (1963), 378 U.S. 539, 12 L.Ed.2d 1018, 84 S.Ct. 1895 (1964) and Callendar et al v. Florida, 380 U.S. 519, 14 L.Ed.2d 265, 85 S.Ct. 1325 (1965), 383 U.S. 270, 15 L.Ed.2d 749, 86 S.Ct. 924 (1966). This is based on the longstanding rule respected by all courts when the jurisdiction of a sister court is involved.

> "As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev. Stat., § 709; Judicial Code, § 237. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision."

* * *

> "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. . . . " John v. Paullin, 231 U.S. 583 (1913) at page 585. See also: Wolfe v. North Carolina, 364 U.S. 177, 4 L.Ed.2d 1650, 80 S.Ct. 1482 (1960).

Accordingly, this Honorable Court is without jurisdiction of this cause, because petitioner is not seeking review of a "final judgment or decree" rendered by the highest court of a state in which a decision could be had, as required by 28 U.S.C.A. Section 1257.

CONCLUSION

For the reasons and authorities herein cited and discussed, the petition for writ of certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

PROOF OF SERVICE

This is to certify that three copies of the foregoing Brief of Respondent have been furnished petitioner's counsel, the Honorable J. Russell Hornsby, 311 North Rosalind Avenue, Orlando, Florida 32801, by U.S. Mail, this _____day of May, 1974.

ENOCH J. WHITNEY
Assistant
Attorney General

OF COUNSEL FOR
RESPONDENT

RESPONDENT'S APPENDIX A

REVISED ORDER

Supreme Court of Florida

JULY TERM, A. D. 1973

TUESDAY, OCTOBER 23, 1973

STERLING CURTIS BOWMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

12/14/73.

CASE NO. 44,271

DISTRICT COURT OF APPEAL, FIRST DISTRICT

S-171

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, C.J., ROBERTS, McCAIN and DEKLE, JJ., concur

ERVIN, J., dissents

ERVIN, J., dissenting:

I believe we should treat the petition for writ of certiorari as one sounding in habeas corpus and require a return from the state. Where a plea of nolo contendere is substituted for a plea of not guilty the record should show if it was voluntary. See Boykin vs. Alabama, 395 U.S. 238, 23 L.Ed2d 274, 89 S.Ct. 1709. If the State's return clearly shows the substituted plea was voluntary then the writ should be discharged. But if doubt exists an evidentiary hearing should be held.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.
By: [signature]
Deputy Clerk

Y
CC: Hon. Raymond E. Rhodes, Clerk
Clerk, Felony Court of Record
Hon. Uriel Blount, Jr., Judge

Hon. J. Russell Hornsby;
Hon. James Campbell
Hon. Enoch J. Whitney